



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-871

HELEN WATERHOUSE SHANNON, Petitioner,

v.

JOHN T. WATERHOUSE, RICHARD
S. WATERHOUSE and ALEXANDER
C. WATERHOUSE, Co-Executors
of the Estate of Martha A.
Waterhouse, Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF HAWAII

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November 24, 1978

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

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DECISIONS BELOW

I. Opinion of the Supreme Court of Hawaii,

reported at 563 P.2d 391.

Helen Watershouse SHANNON,

Plaintiff-Appellant,

v.

John T. WATERHOUSE et al.,

Defendants-Appellees.

No. 5610.

Supreme Court of Hawaii

April 28, 1977.

Syllabus by the Court

1. On a motion for a directed verdict, the evidence is to be viewed in the light most favorable to the party opposing the motion, and where from the evidence a jury could reasonably conclude that the plaintiff's claim is sustainable, the motion should be denied, but where the evidence is not sufficient to take the case to the jury, the trial court should grant the motion for a directed verdict.

2. Performance or part performance of a contract required to be in writing will take the matter out of the statute of frauds where the party seeking to enforce it has acted to his detriment in substantial reliance upon the oral agreement.

3. Forbearance to exercise a right is good consideration for a promise.

4. But a showing of forbearance, in and of itself, is not sufficient part performance to remove a verbal agreement from the operation of the statute of frauds.

5. Assuming the existence of an oral contract, the forbearance on the part of the party seeking to enforce it must have been primarily and substantially motivated by and in pursuance of the agreement.

6. An oral contract to make a will must be established by clear and convincing evidence, and the proof of its part performance must be established by a sim-

ilar quantum and quality of evidence.

Gene Bridges, Honolulu, for plaintiff-appellant.

William L. Fleming, Cades, Schutte, Fleming & Wright, Honolulu, for defendants-appellees.

Before RICHARD, C. J., and KOBAYASHI, OGATA, MENOR and KIDWELL, JJ.

PER CURIAM.

This is an action for breach of an alleged oral contract to will property to the plaintiff. The suit was brought against the executors of the estate of Martha A. Waterhouse, who died testate on March 25, 1970.

Trial was had before a jury. At the close of the plaintiff's case, the defendants moved for a directed verdict. The trial court granted the motion, and the plaintiff appeals. The trial court based

its ruling on noncompliance with the statute of frauds. HRS § 656-1.

On a motion for a directed verdict, the evidence is to be viewed in the light most favorable to the party opposing the motion, and where from the evidence a jury could reasonably conclude that the plaintiff's claim is sustainable, the motion should be denied. *Stewart v. Budget Rent-A-Car*, 52 Haw. 71, 470 P.2d 240 (1970); *Royal State Nat'l. Ins. v. Labor Bd.*, 53 Haw. 32, 487 P.2d 278 (1971). Conversely, where the evidence is not sufficient to take the case to the jury, the trial court should grant the motion for a directed verdict.

A parol agreement to make a will comes within the statute of frauds. HRS § 656-1. The plaintiff-appellant, however, asserts performance on her part as a basis for relief from the operation of the stat-

ute. Performance or part performance of a contract required to be in writing will take the matter out of the statute of frauds, where the party seeking to enforce it has acted to his detriment in substantial reliance upon the oral agreement.

McIntosh v. Murphy, 52 Haw.29,469 P.2d 177 (1970). The plaintiff-appellant's position essentially is that in consideration for the decedent's promise to will her part of her estate, she agreed to refrain, and did refrain, from taking certain steps consistent with her claim to being the lawful widow of the decedent's son, Montague Waterhouse.

The plaintiff-appellant was married to Montague Waterhouse, a son of the decedent on October 29, 1943. He was killed in an airplane crash on January 8, 1944. The record shows that at the time of her marriage to Montague, he might not have been

lawfully divorced from a previous wife. The appearance of the latter as a widow-claimant to Montague's estate, the probate records of his estate, and the plaintiff-appellant's conduct in connection therewith appear to support the conclusion that at the time of his marriage to the plaintiff-appellant, Montague had a legal wife then living. The plaintiff-appellant, however, maintains that she has never conceded that she was not the lawful widow of Montague Waterhouse.

The oral agreement upon which the plaintiff-appellant relies was allegedly entered into in April, 1946. She claims the decedent orally reaffirmed it sometime in 1963. The decedent died in 1970. In the interim, the plaintiff had remarried, to one Shannon in 1952. She was divorced from him in 1959.

Forbearance to exercise a right is good

consideration for a promise. *Loo Ngawk v. Cartwright*, 7 Haw. 401 (1888); *Trousseau v. Cartwright*, 10 Haw. 138 (1895); *Metropolitan Cas. Ins. Co. v. Realty Development Co.*, 32 Haw. 667 (1933). See also 1 Corbin on Contracts, § 140. In this jurisdiction it has been stated:

"Forbearance to sue on a disputed claim, even though it is an invalid one, is a good consideration for a new promise or a compromise, where the party forbearing is acting in good faith. But if he knows the claim to be unfounded and gains an advantage by it through a compromise, his action is fraudulent, and no consideration arises." *United States v. Aoiiau and Kauhoe*, 2 U.S. Dist. Ct. 278 (Hawaii, 1905) (syllabus).

But the mere proof of forbearance is not evidence of part performance sufficient to remove a verbal agreement from the operation of the statute of frauds.

See *Fairall v. Arnold*, 226 Iowa 977, 285 N.W. 664 (1939); *Levi v. Murrell*, 63 F.2d 670 (9th Cir. 1933), cert. denied 290 U.S. 638, 54 S.Ct. 55, 78 L.Ed. 554. Much more must be shown by the party relying upon it. And while we do not go so far as to say that the act of forbearing must be "unequivocally" or "exclusively" referable to the verbal contract, see *Fairall v. Arnold*, *supra*, we do hold that the forbearance on the part of the party seeking to enforce it must have been primarily and substantially motivated by, and in pursuance of the oral agreement. Cf. *McIntosh v. Murphy*, *supra*; *Perreira v. Perreira*, 50 Haw. 641, 447 P.2d 667 (1968).

Moreover, an oral contract to make a will must be established by clear and convincing evidence. And to remove it from the operation of the statute of frauds, its part performance must be es-

tablished by a similar quantum and quality of evidence. 1 Bowe-Parker: Page on Wills, § 10.43.

Based on the foregoing considerations, we find from the record no reversible error. Assuming the existence of an oral contract to make a will, a serious question existed as to whether the alleged forbearance on the part of the plaintiff-appellant was directly referable to the agreement. We agree with the trial court that the plaintiff had not presented evidence from which the jury might reasonably have found, after measuring the evidence against the requisite standard of proof, that her forbearance was primarily and substantially motivated by, and in pursuance of the alleged oral agreement to make a will.

Affirmed.

II. Order of Trial Court granting directed

verdict, filed in the First Circuit Court of Hawaii on October 15, 1973.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HELEN WATERHOUSE SHANNON,

Plaintiff,

v.

JOHN T. WATERHOUSE, et al.,

Defendants.

CIVIL NO. 32646

ORDER GRANTING DEFENDANTS'

MOTION FOR A DIRECTED VERDICT

Defendants, on October 1, 1973, during the trial of the above-entitled case and after the plaintiff rested her case, made an oral motion pursuant to Rule 50(a) of Hawaii Rules of Civil Procedure for a directed verdict in their favor and against the plaintiff. The Court, after having heard the arguments of counsel and having considered the authorities presented on

behalf of the parties found, for the reasons stated by the Court in its oral decision, that the evidence presented by the plaintiff was insufficient to create an issue of fact for the jury and that said motion should be granted;

IT IS HEREBY ORDERED that said Motion for a Directed Verdict made on behalf of the defendants be and it is hereby granted;

IT IS FURTHER ORDERED that judgment be entered in favor of the defendants and against the plaintiff dismissing this action with costs.

DATED: Honolulu, Hawaii, this 15th day of October, 1973.

/s/ NORITO KAWAKAMI

JUDGE OF THE ABOVE-ENTITLED COURT

III. Judgment of Trial Court, filed October 16, 1978, in the First Circuit of Hawaii.

HELEN WATERHOUSE SHANNON,
Plaintiff,

v.

JOHN T. WATERHOUSE, et al.,
Defendants.

CIVIL NO. 32646

JUDGMENT

Pursuant to the Order Granting Defendants' Motion for a Directed Verdict filed herein on October 15, 1973, it is hereby;

ORDERED, ADJUDGED AND DECREED that the plaintiff take nothing, that this action be dismissed on the merits as against all defendants and that defendants recover from the plaintiff their costs to be taxed in this action.

DATED: Honolulu, Hawaii, this 16th day of October, 1973.

/s/ NORITO KAWAKAMI /Seal/

JUDGE OF THE ABOVE-ENTITLED COURT